

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re: :  
CENGAGE LEARNING, INC., et al., : Docket #16cv7123  
 : 1:16-cv-07123-WHP-GWG  
 :  
 Plaintiffs, :  
 :  
 - against - :  
 :  
 BOOK DOG BOOKS, LLC, et al., :  
 : New York, New York  
 Defendants. : February 6, 2018  
 :  
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PROCEEDINGS BEFORE  
THE HONORABLE GABRIEL W. GORENSTEIN,  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

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THE COURT: Hello, this is Judge Gorenstein.  
Who's on the line, please?

MR. MATTHEW OPPENHEIM: Good evening, Your Honor.  
It's Matt Oppenheim and Corey Miller on behalf of  
plaintiffs.

MR. EVAN MANDEL: It's Evan Mandel on behalf of  
defendants. Good evening.

THE COURT: Okay, we're being recorded. We're  
here based upon the letter filed today by Mr. Oppenheim,  
docket 320, and I saw the response from Mr. Mandel, number  
322. So, Mr. Oppenheim, go ahead.

MR. OPPENHEIM: Your Honor, yesterday evening,  
after we did our hearing with the Court, defendants  
produced 80 to 90 pages of financial documents. This  
production was unexpected and includes a variety of  
different types of documents dating back from 2012 all the  
way through 2016 and some 2017 information.

As the Court may be aware, the defendants and  
their counsel have repeatedly indicated to this Court and  
the plaintiffs that Mr. Smyres is the sole owner of the  
companies at issue, and Mr. Smyres is the sole recipient of  
any profits and that complete financial information was  
provided within the annual financial statements. All three  
of those representations appear to be inaccurate. These

are but a few of the issues raised by the documents which plaintiffs have just had several hours to digest since they were only produced last night.

The documents that were produced indicate that there's a second owner of one of the key Smyres companies, and that second owner was to receive distributions of 20 percent of the profits from the rental book business, as well as substantial other payments. Mr. Mandel in his letter that was just filed and we've only briefly had an opportunity to review has taken the position, well, that that may be what the documents say with respect to the 2012 document, that that's not, in fact, what is in subsequent documents.

Mr. Mandel's representation to the Court is inaccurate. In fact, the 2015 mutual termination agreement specifically says that Mr. Glass's participation interest is transferred to Mr. Glass's entity company called Starfire Solutions, LLC, or from Starfire Solutions to another entity, SSSCI Holdings, a Cayman Island corporation. And then subsequently in another 2015 agreement, there's yet, again, references to the fact that the profit distribution was, indeed, to continue. So Mr. Mandel's position in his letter that the documents didn't reflect the reality of how the company operated appear not

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2 to be accurate.

3           These representations - the fact that there is a  
4 second owner receiving distributions of profits now  
5 undermines representations that counsel has made to the  
6 Court, undermines sworn deposition testimony by multiple  
7 witnesses in this case. It's contrary to sworn affidavits  
8 by Miss Cox, contrary to interrogatory responses, and I  
9 believe, Your Honor, is substantially contrary to  
10 information provided in BDB1, but we've not yet had time to  
11 gather all of that.

12           We've asked the defendants when they became aware  
13 of these documents. Based on the - the defendants have  
14 refused to tell us. Based on the time stamp of the  
15 QuickBook printouts, these documents were gathered on  
16 January 31. They were not produced, Your Honor, until last  
17 night, notably after our hearing. There's no reason we  
18 understand why these documents were held from January 31,  
19 yet let alone not produced years and years ago.

20           Some of the documents, Your Honor, are redacted,  
21 and no privilege log has been produced. During the meet  
22 and confer, the defendants have claimed that some of the  
23 redactions are a result of work product. Work product, as  
24 I understand it, Your Honor, is materials prepared in  
25 anticipation of litigation. I'm not sure how provisions of

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2 an agreement providing an equity participation could be  
3 work product. But in any event, there's no privilege log,  
4 and that has not been set forth in any reliable way.

5           Your Honor is well aware I believe of the long  
6 history of plaintiffs seeking financial documents in this  
7 case. Indeed, we have been seeking those documents since  
8 March of 2017. The discovery cutoff was in August of last  
9 year, then extended to October 4. We, Your Honor, filed,  
10 plaintiffs filed a motion for an adverse inference based on  
11 defendants' failure to produce financial documents.

12           Judge Pauley asked us to work collectively in an  
13 effort to avoid that motion having to be ruled on and try  
14 to resolve the failure of production. He asked the parties  
15 to go back, work on that issue, produce documents, take  
16 depositions. Since that time the defendants initially  
17 refused to produce the documents we requested, and we had  
18 to come to the court and get Your Honor to order them to  
19 produce the documents, which Your Honor did. Your Honor  
20 set a deadline of January 16 for the production of those  
21 documents.

22           Then we asked to take a deposition based on those  
23 documents. The defendants refused. We had to come to Your  
24 Honor and ask for that deposition to go forward. Then they  
25 indicated that they wanted the deposition to be limited in

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time, which we refused to agree to, so we had to come forward. Your Honor, we have repeatedly had to come forward to move this issue forward. We are already far behind the schedule we want for this case and to resolve these issues. We took Judge Pauley seriously when he said we should work to try to resolve this financial issue, but we are now stuck in a very difficult place.

The defendants would like, because of their late production last night, for us to adjourn the Cox deposition which has been their goal all along. They should not be rewarded because of their discovery improprieties with getting what they have sought all along.

So we have indicated to the defendants the additional documents that are necessary for us to begin to understand this information that's been provided, and we've given them a list. Those documents they should have already gathered and they should have, and if they don't, they should immediately. And we need those documents by tomorrow morning, Your Honor, in order to have any chance of taking Mrs. Cox's deposition responsibly on Friday as it is currently scheduled. The defendants have indicated that they will consider producing some of the documents we have requested but not all of them and certainly will not agree to produce them before tomorrow morning.

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2           So, Your Honor, we call you in order to ask you  
3 for an order requiring the defendants to produce the  
4 requested documents by tomorrow morning. This is not in  
5 lieu of our seeking other sanctions by virtue of their  
6 discovery misconduct, but rather in a serious effort by  
7 plaintiffs to try to resolve this. We do not understand  
8 why these documents were produced now, years after they  
9 should have been.

10           THE COURT: All right, before I hear from Mr.  
11 Mandel, I need you to think about this a little bit  
12 practically, Mr. Oppenheim. So, for example, if they had  
13 not already collected items five and six on your list, it  
14 would be absurd to, I think, suggest they could do it by 8  
15 o'clock tomorrow. So I think you need to ground your  
16 requests in our current reality without prejudice to any  
17 future applications you might make. So if you want the  
18 deposition to go forward on Friday, let's talk about what's  
19 realistic, and if you tell me five and six is realistic,  
20 you're going to lose some credibility with me. But if you  
21 want to go ahead and do that, go ahead.

22           MR. OPPENHEIM: Well, Your Honor, here's the  
23 issue. There are a couple of issues here. One is that I  
24 don't want to push the entire schedule back because we're -  
25 based on the schedule that's already been agreed upon with



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the defendants, we're not going to finish the expert depositions until basically a week before trial. That already prejudices the plaintiffs in putting their case together. We shouldn't - we shouldn't have to be dealing with that, but we are because of this financial discovery being pushed back so far. So we shouldn't be further prejudiced in terms of the schedule, that's one.

Two, I mean we've already paid for and bought tickets to fly out --

THE COURT: I don't think you heard what I said, Mr. Oppenheim. Let me try it again. I'm assuming you are going forward on Friday, and I'm not suggesting you should not go forward on Friday. What I said was we need to be realistic about what it means to go forward on Friday, and if being realistic means you have to get certain documents tomorrow, I will accept that. But what I can't accept as realistic is a notion that they would conduct an email word search and do a privilege review or whatever else they had to do, responsiveness review, on your requests five and six between now and 8 a.m. That doesn't seem realistic to me.

MR. OPPENHEIM: I'm sorry, Your Honor, I didn't fully understand. Your Honor, they should be ordered to produce as much as they can humanly produce by 8 a.m. tomorrow, and certainly every single agreement which should

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2 be easily produced. To the extent that there are  
3 additional documents that they produce say 24 hours later,  
4 Your Honor, depending on the volume and the nature of them,  
5 plaintiffs may or may not be able to get through them for  
6 purposes of the Friday deposition, and to the extent  
7 necessary, Your Honor, they should, the defendants should  
8 have to bring the witness to Washington in order to  
9 complete the deposition on those additional documents, and  
10 that should happen early the following week without the  
11 schedule being adjusted for defendants. It may be adjusted  
12 for plaintiffs.

13 THE COURT: Again, before I hear from Mr.  
14 Mandel, it's hard to imagine, you know, a deposition on  
15 Friday and one two days later. That doesn't - two business  
16 days later, I mean that doesn't make a lot of sense to me.  
17 But, you know, and there may be other options, a telephonic  
18 deposition or something, if you can point to a need based  
19 upon a late production. But let me hear from Mr. Mandel as  
20 to what production if any, he's agreeing to and when it  
21 would be done. Or any other issue. Go ahead, Mr. Mandel.

22 MR. MANDEL: Sure. I appreciate the Court  
23 making itself available so quickly, you know, given all of  
24 this. And as a result of that, I'm going to take the time  
25 to address all of his points.

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I will say that plaintiffs know Mr. Smyres is not the sole owner of all of these companies. They asked extensive questions in the deposition about the fact that his son owns part of at least one of these companies.

THE COURT: Glass is his son, I'm sorry?

MR. MANDEL: And they never sought --

THE COURT: Glass is his son?

MR. MANDEL: I'm sorry, a totally separate person. No, Your Honor, Glass is just an employee and then an independent contractor. There's another person who is a minor who is Mr. Smyres biological son. He's referenced as NS in the order reference --

THE COURT: I think their point, Mr. Mandel --

(interposing)

THE COURT: Mr. Mandel. I think their point was, I mean perhaps what you're assuming, but more to the point that Glass was not being identified as someone sharing profits. I think that was really their point. That had not previously been (indiscernible).

MR. MANDEL: And I completely understand that.

THE COURT: Okay.

MR. MANDEL: And what I was leading up to was the fact that they did not seek any email correspondence concerning Mr. Smyres' son or what the nature of his

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2 interest was or how it worked or anything. Similarly, they  
3 did not seek any email correspondence with respect to  
4 Garrison or Stonehenge, and throughout discovery they were  
5 arguing that Garrison and Stonehenge were investors in the  
6 business and all the money they received or part of the  
7 money they received has to be considered the profits of the  
8 business. The only issue here is the number of the profits  
9 of the business. That's the only thing we're  
10 investigating, and that is a factor that the jury may  
11 consider. In the unlikely event it finds liability and it  
12 awards some statutory damages, it can consider the  
13 defendants' profits.

14           The plaintiffs want to argue that some portion of  
15 what Garrison and Stonehenge received should be considered  
16 profits. Similarly, the plaintiffs want to argue, I  
17 assume, that some of the money received by Mr. Glass should  
18 be treated as profits for purposes of that analysis. The  
19 reality is we have already produced every single thing that  
20 the plaintiffs have sought with respect to all the other  
21 people and entities they want to argue the payments they  
22 received should be treated as profits.

23           With respect to Garrisons is all they requested  
24 was the number, the payments themselves, how the payments  
25 were calculated, and long after discovery closed they

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2 requested the agreements. And all of that was ultimately  
3 produced. Similarly, we believe all of that has been  
4 produced with respect to Mr. Glass. I'm double-checking  
5 with my client on all of that.

6

THE COURT: Wait, wait, wait, so if you - make  
7 my life easier, Mr. Mandel, since you're saying certain  
8 things have been produced. Are you saying that you've  
9 already produced number one on his list?

10

MR. MANDEL: So turning to his list, we have  
11 produced number one with respect to the relevant period in  
12 BDB2 which is 2013 through 2016.

13

THE COURT: Okay, well, I gather there's a  
14 desire now to have it earlier given that there was a  
15 contention that he was getting profits before 2013, right?  
16 So is there a problem with producing any previous  
17 agreements?

18

MR. MANDEL: Yeah, we don't feel discovery in  
19 BDB1 should be opened, and that's the case for a variety of  
20 reasons. Most principally, the plaintiffs and the  
21 defendants entered into a stipulation as to what the  
22 profits of the defendants are in BDB1, and that stipulation  
23 specifically says plaintiffs are entitled, the Court has  
24 already determined that plaintiffs are entitled to a whole  
25 host of additional documents, and plaintiffs have decided

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2 that in lieu of receiving those documents, they're entering  
3 into a stipulation. They understood discovery was not  
4 complete with respect to profits when they decided to enter  
5 into that stipulation, and they should be held to it like  
6 any party should be held to any stipulation they enter into  
7 in federal court. In addition, I believe it was yesterday  
8 this Court issued an order saying that any requests for  
9 supplemental discovery in BDB1 had to be made by 2015.

10           The reality is we're not, these are not  
11 legitimate requests. Plaintiffs are not seriously  
12 interested in any of these documents. They didn't seek  
13 them with respect to any of the other individuals they want  
14 to argue the profits are relevant. All that plaintiffs are  
15 trying to do here is muddy the water --

16           THE COURT: Well, hold on, if I can --  
17           (interposing)

18           MR. MANDEL: -- failed to provide --

19           THE COURT: Mr. Mandel, I'm not accepting the  
20 parallelism. My understanding is that this has been  
21 generated by a late production by you, unlike what occurred  
22 in the other situation, in which you are saying, you know  
23 what, we just realized this guy was getting something  
24 called profits. We don't really think it's profits, so  
25 just ignore what the label is. But you're now giving that

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2 to them for the first time. And I don't see why they  
3 shouldn't be entitled to test whether that is profits by  
4 seeing whatever the agreement was. So I'm not sure I buy  
5 the parallel to what happened yesterday.

6 Now, as to what period this relates to, I guess I  
7 would need to hear from Mr. Oppenheim whether there was,  
8 whether people sort of wrapped up profits in Book Dog Book  
9 1 and whether this request is spilling over into Book Dog  
10 Book 1. So let me just hear from Mr. Oppenheim on that.

11 MR. OPPENHEIM: Yes, Your Honor, and I can  
12 respond to several of the other points as well, Your Honor,  
13 if you'd like. But with respect to that specific issue, I  
14 think it relates both to Book Dog Book 1 and to Book Dog  
15 Book 2. So with respect to Book Dog Book 2, if you just  
16 look at these documents, they are referencing earlier  
17 documents. So in order to understand the documents that  
18 were produced, you need the earlier documents.

19 So I'll give you, for example, Your Honor, the  
20 employment and - the equity participation agreement, the  
21 first page of which references that there is an, there are  
22 equity contract rates that were previously agreed to. And  
23 this equity participation agreement is a follow-on to those  
24 equity contract rights. So we need to understand those in  
25 order to understand this. So that's number one, Your

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2 Honor.

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Two, the stipulation in BDB1 was entered into after a significant amount of discovery was provided. That discovery was unequivocal that Mr. Smyres was the sole owner of the company at issue. Mr. Smyres testified to that in the very first deposition. And so it now appears, and, again, Your Honor, we haven't had time to go through everything that they said and did in BDB1 and how it now appears to be inaccurate. We'll do that in a subsequent motion. But it now appears that a large part of that could be unwound based on this, and I don't know what the impact of that is, Your Honor. But at a minimum we should be able to get that information.

To the extent that Mr. Mandel is saying we didn't seek this kind of information with respect to Noah Smyres, Noah Smyres was a toddler, so we didn't ask for his emails. He was I think two years old at the time. He's maybe five now, I don't know. But certainly we weren't going to seek those emails between him and his son. And his interest was miniscule, and he was never paid a distribution we were told. This is a 20 percent equity participation, and what's interesting about it is if you read the agreements, in one agreement it seems to say he gets 20 percent of Geckert, another agreement he seems to get 20 percent of



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Robert William Management. But the financial documents that the defendants produced show that the payments were coming out of Anaïd Holdings, a company that we were told was a holdings company. So why there are payments coming out of Anaïd Holdings we don't understand, but we can't understand the printout because they cut off certain entries in the printouts.

So anyways, Your Honor, these documents raise more questions than they answer, but the defendants can't make a very late production --

THE COURT: Okay, hold on, hold on, I really- I interrupted Mr. Mandel because he made certain arguments about number one, and I wanted to hear your response to number one. So I'm going to go back to Mr. Mandel, let him finish out the other categories, and then I'm going to hear from you. All right, go ahead, Mr. Mandel, as to the other categories.

MR. MANDEL: Sure.

THE COURT: Two through six.

MR. MANDEL: With respect to number two, we have produced all responsive documents, again, from 2013 to 2016.

THE COURT: So your objection is the year?

MR. MANDEL: Yes. With respect to number three,

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2 we produced that in its entirety. There they're only  
3 seeking with respect to 2013 to 2016. That is the thing  
4 that I reference in my letter with double-checking to make  
5 sure we haven't missed anything, but have no - the goal was  
6 to produce all that by yesterday.

7 Number four, there's only - we can produce number  
8 four, I don't think they're entitled to it, but there's  
9 only one document and there's no burden in producing it.  
10 So we can produce number four. Numbers five and six are  
11 the email communications, and we object to those.

12 THE COURT: Have you gathered them already?

13 MR. MANDEL: No. I mean they were requested  
14 from us I guess it was, I didn't see the email from this  
15 morning, but it was late last night.

16 THE COURT: Okay, and back to number --

17 MR. MANDEL: Just to be clear --

18 THE COURT: Go ahead.

19 MR. MANDEL: Just to be clear, with respect  
20 numbers five and six, they're just not seeking emails, you  
21 know, their argument with respect to Mr. Smyres' son is Mr.  
22 Smyres' son is too young to send emails, and I understand  
23 that. But they didn't ask for any emails about Garrison  
24 and Stonehenge. Garrison is a hedge fund that lent money  
25 to the defendants, and there's a dispute there should that

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money be treated as profits or should that money be treated as interest and fees on a loan, and they didn't even ask for the agreements with Garrison and Stonehenge during the discovery period. They have never, to this date they've never asked for a single email on the subject.

THE COURT: And --

MR. MANDEL: The pur --

THE COURT: Go ahead.

MR. MANDEL: The purpose of requests five and six is to somehow justify two days of depositions and to support some sort of sanctions motion.

THE COURT: Let's not assume motives --  
(interposing)

MR. MANDEL: -- produced --

THE COURT: Let's not assume evil motives on our adversaries. Let's just address the merits of the dispute. Well, turning to number two --

MR. MANDEL: I have nothing further.

THE COURT: All right, back to number two, compensation - hold on.

MR. OPPENHEIM: Can I address that, Your Honor?

THE COURT: Hold on.

MR. OPPENHEIM: Number two.

THE COURT: Well, let me just understand from

1 20

2 Mr. Mandel. So you have the same objection on the years  
3 which is somehow that's pure Book Dog Book 1, and,  
4 therefore, it's too long a period?

5 MR. MANDEL: The objection is there's a  
6 stipulation --

7 THE COURT: And the same stipulation --  
8 (interposing)

9 MR. MANDEL: -- received in consideration --

10 THE COURT: Right, and he's saying the  
11 stipulation was based upon false representations, which is  
12 going to be a little hard to unravel right now. All right,  
13 I'll hear from Mr. Oppenheim.

14 MR. OPPENHEIM: Your Honor, with respect to  
15 number two, we're not just seeking W2's, K1's, and 1099's,  
16 which is I believe how Mr. Mandel is reading the request.  
17 Whether or not they issued the proper tax documents is not  
18 the question. The question is what payments were made and  
19 what documents are there regarding those payments? So when  
20 Mr. Mandel indicates that they've produced all of the  
21 documents regarding the payments, what they've produced,  
22 for instance, for 2013 there's a single line which has a  
23 reference number and a cutoff, wire transfer, and then it  
24 just has a number. There's no information related to it at  
25 all, and similarly we could go through for each of them,

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2 what they've given us is not complete payment information.  
3 We don't understand who it came from, who it went to. We  
4 want all of the documents associated with the payments, and  
5 we don't want to end up in a situation where, just because  
6 they didn't handle this properly from a tax perspective, we  
7 don't get the information.

8 THE COURT: Okay, so it's your belief that there  
9 are other documents reflecting the payments than what you  
10 got? I'm not sure I follow.

11 MR. OPPENHEIM: Well, there will be - so, for  
12 instance, Your Honor, a ledger entry as described in number  
13 three is more than just the cutoff line we have from the  
14 QuickBooks. There will be a complete entry in QuickBooks.  
15 There will also likely be some documents showing an invoice  
16 or a calculation about what was being paid and wire  
17 transfer or a check or some kind of documentation  
18 associated with the payment.

19 Now, based on what we're looking at, we're not  
20 talking about a huge number of payments. In 2013 it  
21 appears that there was one. There were two in 2014. We're  
22 talking about a handful here of payments, and we'd like the  
23 documentation associated with all those payments, both the  
24 complete ledger entries, not the cutoff entries we have,  
25 but also the complete payment information, not just the tax

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documents.

THE COURT: Mr. Mandel, do you want --

MR. MANDEL: I think I misspoke earlier, Your Honor, when I said we had already produced that stuff. I think Mr. Oppenheim is right, he makes a fair point. His request number two seeks all documents not just the tax reporting documents. And I think there's two issues embedded in here. The first is what we produce shows the date of the payment and the amount of the payment, and because of the way in which it was produced, some of the columns were truncated. We will produce untruncated columns. I understand the plaintiff's concern. There was not a goal to truncate those columns. I didn't even focus on it. That's fine. We'll produce a copy where you could see the whole column.

With respect to all documents, all documents is very broad, and I think part of this problem originated from my agreeing to a request from the plaintiff that was incredibly vague and they're now arguing it's interpreted in a way that I never imagined at the time it could be interpreted. And I don't know what all documents mean. However, to the extent what he's referring to is to these handful of payments, if it was a check or a wire transfer, we can search for cancelled checks or wire transfer

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2 confirmations, I don't know that we're going to have them,  
3 but we can conduct a reasonable search for them.

4 THE COURT: But what caused --

5 (interposing)

6 MR. MANDEL: Then there's a lot of these --

7 THE COURT: What caused someone to make the  
8 payment to this guy? Is it an agreement? Is it an  
9 invoice? I mean what is it?

10 MR. MANDEL: It's the agreement that we've  
11 already --

12 THE COURT: The agreement is going to say you  
13 must pay X percent or whatever, X dollar value on certain  
14 dates, and that'll match up to these payments?

15 MR. OPPENHEIM: The agreements have a very  
16 complicated formula of certain triggers causing certain  
17 payments based on certain thresholds. And for different  
18 things occurring, Your Honor, and so there will necessarily  
19 be, somebody will have done a calculation, likely a  
20 spreadsheet, much like the Garrison monthly reporting  
21 packages is my guess, but different because there are  
22 different triggers and different issues. But somebody had  
23 to do some work to calculate these. That's what we need.  
24 We need --

25 THE COURT: Okay, well, hold on, I was asking

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Mr. Mandel this question.

MR. OPPENHEIM: Oh, I apologize. I thought you were asking me, Your Honor.

THE COURT: I was going to say to Mr. Mandel someone has to, something has to cause someone to write a check or make a wire transfer. And unless the contract specifically lists amounts, which I didn't imagine it would, someone had to sit and do a calculation, and that has to exist somewhere.

MR. MANDEL: I think that's correct, and I think that's exactly why we produced a spreadsheet. Mr. Glass's compensation was complicated. There was certain fixed compensation that he was receiving every month, and then there was certain incentive compensation that was - then there were basically different buckets of incentive compensation.

THE COURT: And for each payment is there a document that does the calculation?

MR. MANDEL: I have asked about that, and there is - the answer is I don't think we maintain a comprehensive set of those documents. It may be for certain payments we have a spreadsheet that calculates the entire payment, or perhaps for certain years - there may be something, a spreadsheet that calculates it for a year.



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2 But from the earlier period of 2013 to 2014, if they exist,  
3 it's not something that can be quickly gathered. I've  
4 looked into that.

5 I think what's key though is that there's only  
6 one of these buckets of compensation that is even arguably  
7 relevant to this case, and we produced to them a  
8 spreadsheet that showed for each year, from 2013 to 2016,  
9 how those amounts were calculated. So I think they have  
10 what they need. If they want to argue - I think they have  
11 what they need.

12 THE COURT: What's a spreadsheet, I'm sorry, I  
13 don't even know what this is.

14 MR. OPPENHEIM: I have no idea what spreadsheet  
15 they're referring to, Your Honor --

16 THE COURT: I asked Mr. Mandel.

17 MR. OPPENHEIM: I think they're referring --

18 THE COURT: What's the spreadsheet?

19 MR. MANDEL: I'm sorry, what was that?

20 THE COURT: What're you talking about, what  
21 spreadsheet?

22 MR. MANDEL: There is a spreadsheet, it's one  
23 page long, it's very simple, for each year. Essentially  
24 the one bucket that's at issue here, and I won't say the  
25 number because the number's highly confidential, but Mr.

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2 Glass was to receive X percent of certain distributions  
3 that Mr. Smyres received. And there's a calculation, we  
4 produced a spreadsheet that shows what amount Mr. Smyres  
5 received, and a 20 percent calculation, and then I believe  
6 it totals up the amount that Mr. Smyres received over the  
7 relevant period --

8 (interposing)

9 THE COURT: It's for a lengthy period this  
10 spreadsheet?

11 MR. MANDEL: -- so each year --

12 THE COURT: It's for some --

13 MR. MANDEL: It's for all four years of the  
14 relevant --

15 THE COURT: So this is an after-the-fact thing  
16 someone put together; it's not contemporaneous.

17 MR. MANDEL: Obviously.

18 MR. OPPENHEIM: Isn't there a Bates --

19 THE COURT: Do you have a Bates stamp number?  
20 Apparently no one knows what you're talking about.

21 MR. MANDEL: I mean it should be in yesterday's  
22 production. I don't have the production in front of me.  
23 If you're saying you didn't see it, if the plaintiffs are  
24 saying they didn't see it in the production, I suppose it's  
25 possible it was omitted, but we certainly wanted to include

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2 it.

3 THE COURT: Just email to them the spreadsheet  
4 within 15 minutes of the end of the phone call, and I'm  
5 sure that'll solve that problem.

6 Okay, again, we need to talk about what's  
7 realistic, and it seems to what's realistic by tomorrow  
8 certainly is getting all those agreements. So I'm going to  
9 order the production of the agreements from 2008 to the  
10 present, and you should get that to them by noon tomorrow.  
11 That's number one.

12 Number two, I don't know what to do. It sounds  
13 like you don't think those are gatherable. Is that right,  
14 Mr. Mandel? They don't exist, no one put this in a form  
15 that anyone can find or it's just not findable by tomorrow  
16 or what?

17 MR. MANDEL: Well, I'm not sure - I think this  
18 encompasses many more categories of documents than I  
19 previously understood. But with respect to wire - with  
20 respect to the period of 2013 through 2016 with respect to  
21 wire transfers and checks, I think that probably can be  
22 gathered. With respect to payments that were made as wages  
23 through a payroll service and reported on W2's, I have no  
24 idea if we can get - I have no idea if the plaintiffs want  
25 every paystub Mr. Glass received, but I have no idea if

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2 those are gatherable. And with respect to spreadsheets  
3 showing calculations --

4 THE COURT: Contemporaneous.

5 MR. MANDEL: -- I don't think they're relevant.  
6 I understand, contempor - that's what I meant,  
7 contemporaneous spreadsheets. I don't think they're  
8 relevant. It would probably be possible to gather some of  
9 them, but we could not gather all of them.

10 THE COURT: Okay, well, I mean you - at this  
11 point, you know, I can't accept the defendants' narrative  
12 which is, oh, it says profits, it's not really profits, and  
13 somehow this should be a problem. So I think the  
14 defendants have failed by not producing these documents  
15 earlier, and I don't know if this will solve it, but I am  
16 going to order the production of this material. And the  
17 more they get it before this deposition, the less likely it  
18 is you might have to have a second deposition, which I  
19 can't say won't happen and I can't say you won't have to  
20 bring the person to Washington and it may not be at a time  
21 you want to do it.

22 So I'm not going to cut it fine as to the years  
23 because at this point I can't figure out if there was a  
24 misrepresentation in Book Dog Book 1, just as there was a  
25 failure to produce here that's just happened. So I'm going

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2 to require for all those years to have contemporaneous  
3 backup for whatever these distributions were. The more you  
4 can get them by tomorrow, the better it's going to be for  
5 you. Ledger entries, I guess you feel you've already  
6 produced - this is number three we're talking about.

7 MR. MANDEL: Yes, that we fully satisfied -  
8 their objection, I think, is that it's --

9 (interposing)

10 THE COURT: All right, you're going to solve  
11 that by tomorrow.

12 MR. MANDEL: -- truncated version.

13 THE COURT: So that'll hopefully be solved by  
14 tomorrow. The operating agreement, I assume you can - I'm  
15 going to order that production. You're claiming that's  
16 happened already?

17 MR. MANDEL: No, that we can do by tomorrow.

18 THE COURT: Okay, now, as to the emails, you  
19 know, I mean if you're insisting that this guy's not  
20 getting profits, then this seems highly - you know, you're  
21 the ones who are saying the thing that this thing says is  
22 not true. And regardless of whether there were previous  
23 email requests, this new production and your contentions  
24 regarding it are now raising big issues.

25 If you guys want to just say, you know what,

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2 fine, it's profits, then that's going to solve the problem,  
3 but you're not willing to say that. So you need to produce  
4 the communications that discuss what this material is  
5 between your people and Glass. Now, I doubt you can do it  
6 by tomorrow, I don't know what you can do in the next few  
7 days, but if you're going to persist in that contention,  
8 then those communications need to be produced. If you want  
9 to give me a realistic deadline, I'll do it. If it goes  
10 too far out, you're opening yourself up to that you're not  
11 being able to cure this problem.

12 The simple sanction to me is to just treat this  
13 all as profits, but if you don't want to do that, then  
14 you're going to have to act very quickly.

15 MR. MANDEL: Okay, just so I understand. What  
16 is it we'd have to agree is profit?

17 THE COURT: I think - I mean I assume what this  
18 is all about, and Mr. Oppenheim can correct me, is that you  
19 - Mr. Oppenheim believes these payments to Mr. Glass are  
20 profits and need to be included in that gross number that's  
21 he going to argue to a jury should be a basis for, or  
22 whoever, is going to be a basis for statutory damages.  
23 That's what this is all about, right, Mr. Oppenheim?

24 MR. OPPENHEIM: Your Honor, that is the most  
25 obvious and glaring thing it's about. But it is not all

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2 it's about.

3 THE COURT: Well, what else is the relevance of  
4 this?

5 MR. OPPENHEIM: So, Your Honor, since literally  
6 the very first deposition of Mr. Smyres in, I can't  
7 remember whether it was late 2013 or early 2014. He had  
8 said to us that he was the sole owner of every one of the  
9 companies that he owned other than one, Academico Centro  
10 Americano. We're now learning that that fundamental  
11 understanding about who was involved in the company and who  
12 had an ownership interest is unsettled. And it raises  
13 questions that we would be asking all along to try to  
14 understand how that changes the calculus. So I don't --

15 THE COURT: To what though?

16 MR. OPPENHEIM: So --

17 THE COURT: Maybe it's a credibility issue,  
18 okay, I understand that, but what else are we talking  
19 about?

20 MR. OPPENHEIM: So we never asked Mr. Glass at  
21 all about any ownership interest when we took his  
22 deposition in BDB1 or how it might affect we he was doing.  
23 We never took his deposition in BDB2 because we were told  
24 by the defendants, and this is amazing to me - do you  
25 remember we had that long discussion about who was a

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2 properly disclosed Rule 26 witness, and they had listed  
3 everybody including witnesses from the fraud claim which  
4 was out. And Your Honor said to them you need to indicate  
5 who has knowledge for purposes of BDB2 so the plaintiffs  
6 know who to take depositions of. They did not include Mr.  
7 Glass. Now Mr. Glass, it turns out, had an equity  
8 participation interest and was intimately involved in the  
9 Amazon buyback program. The Amazon buyback program  
10 apparently was the source for some of the books at issue in  
11 the case.

12           So, Your Honor, I can't tell you on the phone  
13 today, other than the profits issue, how what they've  
14 disclosed today changes the fundamental underpinnings of  
15 our case because we had these documents for 24 hours and  
16 that's it.

17           THE COURT:    Okay --

18           MR. OPPENHEIM:   But I don't want to be limited  
19 to just that at this point.

20           THE COURT:    My larger point is the current  
21 requests are critical to your deposition of the 30(b)(6) -  
22 Cox is that her name?

23           MR. OPPENHEIM:   Yes, Miss Cox.   Yes, Your Honor  
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25           THE COURT:    -- critical --



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(interposing)

THE COURT: -- and if they are willing to say now that we'll accept that these things are to characterized as profits, then I think that solves the Cox deposition problem at a minimum. I mean, right, Mr. Oppenheim?

MR. OPPENHEIM: I'm following your reasoning, but here's where I'm getting hung up, Your Honor, is I don't know - we can't calculate the quantum of them because the spread - at least the QuickBooks printouts that we've been given, the numbers don't match in the slightest. Let me put some flesh on that so it makes sense.

So apparently, according to these printouts, Mr. Glass's company was paid in 2016 and 2017 by Anaïd Holdings LLC a fairly substantial amount of money, though it's hard to really understand what's what in this printout. Anaïd Holdings, Your Honor, we have P&L's and balance sheets that you had previously ordered be produced, and the numbers in those P&L's and balance sheets don't reflect any of the payments that are in what we were given last night. I mean they're not even remotely close.

And, by the way, none of the equity participation agreements that we received last night reference Anaïd Holdings. They reference other entities. So we don't know

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2 why Anaoid Holdings is --

3 (interposing)

4 THE COURT: Okay, so the bottom line, to cut  
5 through this, is --

6 MR. OPPENHEIM: I'm sorry.

7 THE COURT: -- is that you still need at least,  
8 for example, the backup documents to verify that the, as to  
9 the actual amount that was paid to Glass.

10 MR. OPPENHEIM: Yes, Your Honor, and from what  
11 entities and how it interrelates with the other financial  
12 documents we've received, if that makes sense.

13 THE COURT: All right, so we're not going down,  
14 at this point --

15 (interposing)

16 THE COURT: Go ahead. Mr. Mandel, you want to  
17 say something?

18 MR. MANDEL: It's amazing - yeah, I mean it's  
19 amazing that they just said that because they were told  
20 when they requested the trial balances, excuse me, the  
21 balance sheets and the profit and loss statements that they  
22 were not accurate. We said that they're not going to be  
23 accurate, you know, it's crazy to produce things that are  
24 not accurate, this is not a good use of time. And Your  
25 Honor said that's fine if they're not accurate but just

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2 produce them anyway, and we did. Now they're saying we  
3 need to do discovery and the fact that they're not accurate  
4 when they knew from day one they weren't going to be  
5 accurate.

6 (interposing)

7 MR. OPPENHEIM: I'm sorry, that was a reference  
8 to the most recent hearing, and Leah, Miss Vicker, excuse  
9 me, made that representation, but not with respect to the  
10 Anaid P&L and balance sheet that were produced last year.  
11 There was never a representation before those documents  
12 were submitted that they were inaccurate. And at the  
13 hearing that Miss Vickers said that to you, Your Honor, you  
14 said to her that they, if they're producing documents that  
15 they think are inaccurate, they should provide a letter to  
16 plaintiffs explaining why they believe they're inaccurate.  
17 We never received any such letter.

18 THE COURT: Okay, this is a little bit of a  
19 sidetrack from what I, a road I was going down that I'm no  
20 longer going to go down which is whether they could be  
21 relieved of the obligation to produce these documents  
22 through some stipulation that the matters were profits. If  
23 you two can't agree on that, that's fine.

24 So we're now back to the road of the production,  
25 we're back to what I said before, which was I went through

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2 it and saying basically it all had to be produced, and the  
3 question is timing, and the more that's produced in advance  
4 of Friday, and we talked about the things that absolutely  
5 could be produced in advance of Friday, the better. And to  
6 the extent things dribble out or fail to come out at all,  
7 there may be consequences from that. So I don't know what  
8 more I can do than that. I think we talked about each  
9 category and what could be done by tomorrow at noon, and we  
10 heard that.

11 And we're now left with the emails which I still  
12 say are relevant given defendants' contentions that the  
13 characterization of this material's profit is incorrect,  
14 that has to be tested through statements, communications  
15 between Glass and the defendants regarding what his role is  
16 and what this money is. And they need to start down the  
17 road of finding those, and if they get to them very  
18 quickly, there may be an opportunity to have some kind of  
19 second deposition. And if they don't, then there may be  
20 other consequences from the failure to produce.

21 So I think that's all I can do right now. Mr.  
22 Oppenheim, anything else you think we should be doing?

23 MR. OPPENHEIM: Not at this point, Your Honor.  
24 Obviously, the plaintiffs reserve their rights as we go  
25 forward to continue to seek an adverse inference.

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2 THE COURT: All right, Mr. Mandel, anything else  
3 we should be doing now?

4 MR. MANDEL: From the defendants - yeah, I mean  
5 the - we do not want to adjourn this deposition. We want  
6 this to be over much more than the plaintiffs want this to  
7 be over, I can assure you. But we can produce whatever  
8 needs to be produced by the end of this week, that can be  
9 done. We're not talking about a massive amount of stuff.  
10 So it seems silly to me to prolong a discovery fight into  
11 the weeks leading up to trial when instead we can adjourn a  
12 deposition by two or three days and just have this all sewn  
13 up. I'm absolutely extremely surprised that we're being  
14 required to produce emails when there were no email  
15 productions on any of these topics with respect to any of  
16 the disputed so-called profit receivers.

17 THE COURT: Did you previously produce documents  
18 claiming things were profits and then simultaneously say  
19 they're absolutely wrong to characterize themselves as  
20 profits? Has that happened before?

21 MR. MANDEL: Yes, that's exactly what happened  
22 with respect to Garrison and Stonehenge. Miss Cox  
23 testified that certain things were profits. She later  
24 changed her testimony, but they seized upon that to say we  
25 want all the Garrison discovery. And Your Honor ordered us

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2 to produce the reports to Garrison showing the numbers, and  
3 Your Honor - and they didn't even seek, by the way, Your  
4 Honor, the contracts with Garrison until longer after  
5 discovery. They sought that in December, and to this day  
6 they haven't sought a single email. But it's exactly the  
7 same dispute.

8           So, you know, they're getting much more now -  
9 they're seeking much more now. Forget about what they're  
10 getting. They're seeking much more now than they ever  
11 sought during discovery, and no one wants to adjourn this  
12 deposition, but if they're actually going to get more than  
13 they got during discovery, which I respectfully disagree  
14 with, but if they're going to get that, rather than appeal  
15 that to Judge Pauley or rather than have two or three more  
16 motions about subsequent depositions and where they're  
17 going to be, it makes much more sense for us to just  
18 produce it this week, even if we disagree with the  
19 production, and have the deposition next week.

20           THE COURT:   You're willing to bring the person  
21 to Washington?

22           MR. MANDEL:   I mean I don't know what the  
23 witness' schedule is, but I can try and do that.

24           THE COURT:   Well, I'm not ordering it, but if  
25 the plaintiffs want to - anyway, I don't have a reason to

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2 believe that what I'm ordering is unreasonable here given  
3 the late production here and the bizarre claim from the  
4 defendants that what it says is not really what it is. So  
5 I don't - I'm not second-guessing at all my ruling. But if  
6 the plaintiffs voluntarily believe there would be an  
7 efficiency in putting this off and if there's some  
8 agreement as to the location that makes them satisfied that  
9 it's worth doing, that's up to the parties, but otherwise  
10 I'm not going to order a postponement of the deposition.  
11 Anything else, Mr. Mandel?

12 MR. MANDEL: So just to be clear, I just want to  
13 make sure. So we're - I think Your Honor has ruled, but I  
14 want to make sure the record is clear. We're seeking a  
15 protective order requiring the deposition to happen  
16 sometime next week, and am I correct in understanding that  
17 the Court is denying that application?

18 THE COURT: That's correct.

19 MR. MANDEL: Okay. Nothing further from the  
20 defendants, Your Honor.

21 THE COURT: Anything else, Mr. Oppenheim?

22 MR. OPPENHEIM: No, thank you, Your Honor.

23 THE COURT: All right, thank you, everyone.

24 MR. OPPENHEIM: Good evening.

25 (Whereupon the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, Cengage Learning, Inc., et al., versus Book Dog Books, LLC, et al., Docket #16cv7123, was prepared using PC-based transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Date: February 8, 2018